Pacesetter Corporation *and* United Steelworkers of America, AFL–CIO, CLC. Cases 17–CA–15533 and 17–RC–10640

May 14, 1992

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On January 9, 1992, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pacesetter Corporation, Omaha, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(a).

''(a) Coercively interrogating employees about their union activities or sympathies, seeking to prevent them from talking about the Union among themselves, seeking to impress on employees the futility of collective bargaining, threatening employees with discharge because of their union activities, or threatening to close the facility and transfer work elsewhere to avoid having to deal with the Union.''

2. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

[1] The Respondent, the General Counsel, and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The General Counsel excepts to the judge's failure to include language in the Order reflecting the 8(a)(1) violations found. We find merit in this exception and shall modify the Order and notice accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT seek to prevent you from talking about the Union among yourselves.

WE WILL NOT seek to impress on you the futility of collective bargaining if you choose the Union as your collective-bargaining agent.

WE WILL NOT threaten you with discharge because of your union activities.

WE WILL NOT threaten you with closure of the Omaha phone room and the transfer of work elsewhere, if you select the Union as your representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

PACESETTER CORPORATION

Mary G. Taves, Esq., for the General Counsel.
Soren S. Jensen, Esq. (Erickson & Sederstrom, P.C.), of Omaha, Nebraska, for Respondent Pacesetter Corporation.
Voly E. Louderback, Representative, of Plattsmouth, Nebraska, and *Richard Hawkins*, Representative, of Omaha, Nebraska, for Charging Party Steelworkers.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard these consolidated representation and unfair labor practice cases in Omaha, Nebraska, on September 24, 1991 (all dates below are in 1991 unless I specify otherwise). In Case 17–RC–10640, United Steelworkers of America (the Union) filed a petition for representation election on February 19, seeking to be certified as the collective-bargaining representative of certain telephone solicitors employed by Pacesetter Corporation (the Respondent) at its Omaha telemarketing center. The Regional Director for Region 17 approved the parties' Stipu-

lated Election Agreement on February 28, and his agent conducted an election in the stipulated voting/bargaining unit on March 20, which the Union lost.[1] The Union filed objections to the election on March 27. It filed unfair labor practice charges against the Respondent in Case 17–CA–15533 on April 4. It withdrew certain objections in the representation case on May 13.

On May 15, the Regional Director issued a complaint in the unfair labor practice case against the Respondent. The complaint, as amended at the trial, alleges that before the election, the Respondent's agents violated Section 8(a)(1) of the Act by interrogating employees about union activities, by ''selectively and disparately'' prohibiting union talk, by making threats of discharge and shutdown, and by emphasizing the ''futility'' of collective bargaining in campaign speeches. Separately, the complaint alleges that, after the election, on March 26, the Respondent violated Section 8(a)(3) and (1) by discharging employee Brian Iwerson because of his union activities.

On May 22, the Regional Director issued an order consolidating the two cases for a common hearing and disposition, contemplating that resolution of the preelection misconduct issues raised by the complaint in the unfair labor practice case would be determinative of the issues in the election objections case. The Respondent, over whom the Board has already taken uncontested jurisdiction in the representation case, again admits that its operations are in commerce and affect commerce, but it denies all wrongdoing.

I have studied the record and the posttrial briefs filed by the General Counsel and the Respondent. I have considered the performance of the witnesses as they testified, and have assessed the probabilities inhering in the undisputed surrounding circumstances. Based on all of that, and, more particularly, on my findings and reasoning below, I will conclude that the Respondent violated Section 8(a)(1) of the Act, substantially as alleged in the complaint, but that its discharge of Iwerson was not a violation under Section 8(a)(3) or (1). I will find that certain 8(a)(1) violations in the critical preelection period require that the election be set aside and a new one conducted after the Respondent remedies all of its unfair labor practices.

FINDINGS AND CONCLUSIONS

I. OVERVIEW

The Respondent operates a plant in Omaha where it manufactures a variety of house exterior products, such as siding, windows, doors, and patio covers. It uses telephone solicitors (communicators is the company term, and I will use it hereafter) to generate ''leads'' for customers for its products. The communicators work from ''booths'' in a ''phone room.''[2] While the Respondent operates satellite phone rooms in other cities in Nebraska, its main phone room is in Omaha, in an office building across the street from the plant. It was the roughly 23 nonsupervisory communicators at the Omaha phone room who made up the eligible voters in the March 20 election.

The communicators generally sell products in only one of five product ''departments'' (e.g., siding, windows), and they report their leads to and take their instructions from a specific department supervisor.[3] These supervisors report to Mike Dean, Omaha telemarketing manager, who reports to Peter Danielson, vice president and general manager. Training Manager Ross Herink is another admitted supervisory agent of the Respondent, and his function appears evident from his title, although it is otherwise unclear where he might fit on the Respondent's table of organization.

Brian Iwerson was one of about nine communicators in the siding department; he earned $6 an hour, plus 2.8 percent of any closed sale for which he produced the lead.[4] In late January, communicators in the siding department began to complain in meetings with their then supervisor, Neil Langer, about the fact that many of them were carrying ''red balances''[5] while ''the higher-ups were getting a bigger slice of the pie.'' This dissatisfaction eventually ripened into open union talk. In a department meeting on January 28, Iwerson told his fellow siding communicators—and Langer—that he would ''contact a union.'' Within a day or two, Iwerson met for lunch with the Union's representative, Richard Hawkins.[6] Thereafter, from February 4 to 15, Iwerson openly passed out prounion pamphlets and buttons furnished by Hawkins, and, on February 15, he solicited a number of employee signatures on authorization cards for the Union. He also served as the Union's election observer in the March 20 election.

On February 19, the day the Union filed the election petition, the Respondent issued the first in a series of preelection campaign letters to voting unit communicators, all signed by ''Pete'' Danielson. Danielson also conducted two ''formal'' campaign meetings in the Omaha telemarketing offices, one on March 11, the other on March 13, attended by all communicators and telemarketing supervisors and managers. At each of these meetings, Danielson played videotapes to the assembled group, and then made informal remarks and responded to questions. Nothing in Danielson's campaign letters nor in the video presentations at the March 11 and 13 meetings is called into question by the complaint or by the outstanding objections. I will mention details below about these written and video communications only insofar as they may be relevant to the more specific acts attacked by the complaint and the objections.

[1] The tally showed 6 votes for representation by the Union, 13 against, with 1 void ballot and 2 nondeterminative challenged ballots.

[2] The communicators make ''cold'' (unsolicited) calls to prospective customers within Nebraska and in the neighboring States of Iowa and South Dakota. The solicitor tries to persuade the ''prospect'' to make an appointment with a local sales representative; if the prospect agrees, the prospect becomes a ''lead.'' The communicator turns over leads to his or her supervisor, who refers the leads to a local sales representative, who then visits the lead and tries to make a sale.

[3] The Respondent admits that the telemarketing supervisors in each of the five product departments are ''supervisors,'' as defined in Sec. 2(11) of the Act.

[4] Iwerson's testimony, harmoniously supplemented by other witnesses, is the skeleton for the findings in this paragraph.

[5] A communicator has a ''red balance'' when his or her percentage commission total is less than the total hourly pay he or she has received during a common accounting period. This negative balance, when it exists, is usually ''carried'' into successive pay periods, to be used as an offset to any greater commissions over base pay the communicator might receive in a later pay period.

[6] The Union has historically represented the production and maintenance employees in the Respondent's Omaha manufacturing plant.

The Respondent discharged Iwerson on March 26, under circumstances closely linked to Iwerson's announcement earlier that day to his new supervisor, Mark Schmahl, that he would be looking for other work because he was not making enough to feed his family. For at least a month before Iwerson was fired, he had been well-known to the Respondent's supervisors and managers as the central in-house organizer for the Union.

II. ALLEGED 8(A)(1) VIOLATIONS

A. *Prepetition Discharge Threat by Ross Herink (Iwerson)*

1. Facts

This is Iwerson's account, in substance: On February 15, Iwerson was passing out union authorization cards to fellow communicators gathered in Iwerson's booth. Training Manager Herink approached and asked Iwerson what he was doing; Iwerson replied that he was passing out union cards. Herink ''kind of smirked,'' and then, as he walked away, turned briefly and asked Iwerson ''where [he] was going to be working next week.'' Herink claims no recollection of any such transaction, and effectively denies that anything resembling it ever took place.

2. Credibility and Conclusions

Subject to exceptions noted below, Iwerson generally seemed to exhibit care for the truth, and a reasonably good memory of pertinent context. Nothing in his testimony about this incident seemed strained or unnatural. Herink struck me as uncomfortably wooden when he denied any recollection of such an incident; he also seemed suspiciously improvisatory in other aspects of his testimony. I credit Iwerson in this instance. I have no difficulty finding in his credited account that Herink conveyed a message that Iwerson was risking his job by soliciting authorization cards, and, therefore, that the Respondent, through Herink, violated Section 8(a)(1).

B. *Postpetition Incidents*

1. March 1 Scott Johnson ''no union talk'' statements (Shepherd)

a. *Facts*

Robert Shepherd, then a prounion communicator in the window department,[7] testified that on March 1, Shepherd was talking with a work neighbor, Andriesen, ''about the Union,'' when Window Department Supervisor Scott Johnson walked up and said, ''There's no talking about the union while you're on the clock, do that on breaks.'' Shepherd states that Andriesen then replied, ''I was just trying to talk him out of it,'' to which ''Scott just pretty much said, [']oh, okay[']and walked away and that was it.''

Supervisor Johnson's version is in some ways similar, thus:

> Well . . . what I said was, [''']come on guys, you know you're not supposed to be talking about this stuff at work, okay[?] So go ahead and get back to work[''], and I walked away.

Johnson was not invited specifically to deny the other elements in the exchange reported by Shepherd (Andriesen's explanation, ''I was just trying to talk him out of it,'' and Johnson's farewell, ''oh, okay'' statement).[8]

b. *Credibility, Supplemental Findings, and Conclusions*

I credit Shepherd's version concerning the tone and details; I base this on his apparently sincere demeanor, contrasted to Johnson's generally awkward presentation, noting also that Shepherd is no longer employed by the Respondent and seemingly has no personal stake in the outcome. I also find it significant that the Respondent does not claim to have maintained, much less previously enforced, any general rule prohibiting employees from nondisruptive talking with work neighbors during work time. Neither did any testimony suggest that the Shepherd-Andriesen conversation was disruptive or otherwise unusual in the workplace. Neither has the Respondent sought to show that some special, exigent circumstances prevailed which might justify a special ban during the preelection campaign on chitchat between workers having a ''union'' *content*. And, in fact, the Respondent affirmatively *encouraged* employees in campaign literature to ''discuss this matter openly''—apparently meaning to ''discuss'' it ''openly'' with the company vice president or with one of his subordinate managers. Thus, in ''Pete'' Danielson's initial campaign letter to ''All Communicators,'' dated February 19, employees were told, inter alia:

> I have received notification that a number of you have signed cards requesting that an election be held so that communicators may become represented by a union. In my opinion, union representation would be a major error for our phone room employees with no substantial benefits to anyone involved.
>
> . . . .
>
> I want to let you know that anyone . . . is free to discuss this matter openly. I would encourage you to talk with me or any of the telemarketing managers about your thoughts and concerns . . . . Rest assured that we welcome your questions and there will be no adverse consequences or retaliation for sharing your thoughts with us.

And a March 15 campaign letter from Danielson was bracketed by similar entreaties to employees to bring their ''questions'' and ''concerns'' about the union matter to their supervisors and managers.[9]

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[7] Shepherd was no longer employed by the Respondent when he appeared as the General Counsel's witness at the trial.

[8] The closest the Respondent's counsel came to this point was in his oblique question at Tr. 212, ''Did you ever indicate to any employee it's all right to talk in favor of the union on company time?''—to which Johnson replied, ''No. Because we're not supposed to do that.'' I do not treat this as fairly testing the factual point suggested by Shepherd, that Johnson had quickly become mollified when Andriesen had explained that this particular ''union'' talk only amounted to an effort to persuade Shepherd to reject the Union.

[9] P. 1, second para.:

> Remember that we are perfectly willing to discuss any and all questions, and any person who tells you that you shouldn't ask

I do not find it unreasonable to presume in these circumstances that the Respondent would have found no fault if any employee had chosen to leave his or her work station and travel to a management office to unburden him/herself of union-related questions or concerns. And certainly, the Respondent did not intend to suggest by these wide-open invitations that employees could only unburden themselves to their supervisors when they were ''off-the-clock.''

An employer's attempt to ban ''union talk'' facially interferes with the exercise of organizational rights protected by the statute; it may be privileged on a special showing never made in this case.[10] It aggravated the interference in this case that Johnson's attempt to ban ''union talk'' was doubly discriminatory: First, Johnson appeared to excuse the ''union talk'' once Andriesen had explained that he was trying to persuade Shepherd to reject the Union; second, the Respondent was simultaneously encouraging employees in campaign tracts to ''discuss this matter openly'' with company higher-ups, with ''no adverse consequences for sharing your thoughts with *us*.'' Clearly, the Respondent operated under no ''business'' need to prevent union-content discussions from taking place. I thus conclude that in this instance, the Respondent, through Johnson, violated Section 8(a)(1).

2. Late February-early March Ross Herink ''no union talk'' statements (Iwerson)

a. *Facts*

Iwerson described an experience with Training Manager Herink which was similar to Shepherd's encounter with Johnson, above. Thus, Iwerson testified that in late February or early March, Herink approached as Iwerson was ''talking . . . about the union'' with two other communicators, answering their questions, all this during some ''idle time'' when the ''computers were down.'' According to Iwerson, Herink,

> asked me if I was talking about the union on company time. . . . I told him I knew what my rights were, not to intimidate me, that anytime I had free time to talk about the weather, fishing, my family, I could talk about the union; . . . and what he told me is . . . ['']well, I better not hear you again['']; and . . . I told him not to try to intimidate me, that I knew what my rights were. And as he walked off, he said, ['']well, you heard what I said.['']

Herink recalled a similar incident, in which, like Supervisor Johnson, he claims to have made far less confrontative remarks, but ones obviously intended to convey to the employees that talk with ''union'' content should be limited only to ''break'' or ''lunch'' time.[11] He also denied that the ''computers were down'' at the time of this transaction.

b. *Credibility and Conclusions*

I credit Iwerson's more convincingly uttered account for the tone and details. It is reasonably clear from Herink's account in any case that Herink was conveying to employees that the Respondent would not permit ''union'' talk during ''company time,'' even while the Respondent was blatantly inviting employees in campaign publications to take the time to talk ''openly'' about the Union with their supervisors and managers. Consistent with my analysis above at B,1, I conclude that when Herink warned Iwerson against talking about the union except on break or lunchtime, the Respondent violated Section 8(a)(1).

3. ''Early March'' interrogation by Herink (Collins)

a. *Facts*

Timothy Collins, formerly a communicator whose last date of employment with the Respondent was on March 11, testified that in ''early March,'' Herink called Collins into his office and then,

> He asked me how I felt about the union and I never gave him any direct response on it. I said I didn't know. And he asked me what we felt we could accomplish by getting the union and I . . . again—didn't give him any direct answer . . . I just said I wasn't sure. And from there on, we started talking about work.

Herink claimed never to have had any such conversation. He acknowledged that, ''every Monday I had a conversation with all employees on an individual basis . . . we went over their performance and also any problems that they had with the job.'' He allowed that, in some of these ''performance'' meetings in the preelection period, employees may have brought up the subject of the Union on their own, but he said that he never originated the subject. Moreover, he claims no recollection of any union-related discussions with Collins. Collins, called on rebuttal, was asked if the meeting in question occurred on a ''Monday.'' He replied, ''Not to my knowledge, no.'' Asked then if the meeting in question was ''to discuss your recaps'' (i.e., sales performance sheets maintained by Herink), Collins replied, ''No, it was not.''

b. *Credibility and conclusions*

I credit Collins, because he gave this testimony with apparent sincerity and was no longer employed by the Respondent when he testified, and because Herink did not here or elsewhere impress me as being candid. Herink interrogated Collins. Collins was not shown to be an ''open'' or ''active'' union supporter within the meaning of *Rossmore House*[12] when Herink initiated the interrogation.[13] That case teaches that mere ''casual'' questioning by a supervisor of a

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questions about the union matter is not giving you good advice or acting in your best interests.

P. 4, last para.:

Don't forget, if you have questions which are bothering you, let's talk about them.

[10] E.g., *Wilshire Foam Products*, 282 NLRB 1137, 1158 (1987), and cases cited.

[11] Herink: ''I said, Brian . . . it's all right to talk about this stuff if you're on break or at lunch but now everybody's supposed to be in your booth.'' He acknowledged that Iwerson replied, ''I know my rights,'' and says he then repeated the same admonition just quoted.

[12] *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[13] Collins testified that he wore a union button to work on February 15, and again on the day before the election. Herink stated that he was unaware of Collins' union sympathies and had not been aware that he had worn a union button on February 15.

self-identified union adherent about union-related matters will not alone violate Section 8(a)1); rather, the Board will take ''all the circumstances'' into account in deciding, ''[w]hether . . . the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.''[14] In any case, under *Sunnyvale Medical Clinic*,[15] which applied *Rossmore House* more expansively, even an employee whose union sympathies are unknown may be interrogated about union-related matters by a company agent, under certain ''case-by-case'' circumstances; thus, the *Sunnyvale Medical* Board interpreted *Rossmore House* as,

> . . . signal[ing] disapproval of a per se approach to allegedly unlawful *interrogations in general*, and to return to a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation and that does not ignore the reality of the workplace.[16]

Obviously, we are discouraged from ''per se'' approaches, and we must not ''ignore the realities of the workplace.''

In finding this interrogation to be unlawfully coercive, I am influenced by the fact that Herink's questioning of Collins was not shown to have been a natural outgrowth of some casual conversation, but apparently was his first order of business before turning to ''work'' subjects. In addition, the interrogation occurred in Herink's office, a locus of managerial authority, to which Collins had been summoned. I thus conclude that when Herink interrogated Collins, the Respondent violated Section 8(a)(1).

4. Danielson's statements to employees in group meetings

a. *Introduction*

The complaint alleges in pertinent part:

> 5.
>
> (a) On or about February 20, 1991, and March 11, 1991, [Danielson] . . . threatened to close the facility if the employees selected the Union . . . .
>
> (b) On or about March 11 . . . and March 13 . . . [Danielson] . . . informed its employees that it would be futile for them to select the Union as their bargaining representative.

Both of these counts address General Manager Danielson's remarks in group meetings. Testimony about those remarks was offered by Iwerson, by (former) communicator Collins, and by Danielson, himself.[17] While this testimony is diverse and mostly fragmentary, there is no dispute among these witnesses about certain features, and they provide the basis for these findings: Danielson conducted ''formal'' campaign meetings on March 11 and 13, attended by all communicators and telemarketing supervisors and managers. At each of these meetings, Danielson played videotapes to the assembled group, and then made informal remarks and responded to questions from the communicators. Iwerson and Danielson substantially agree that the video presentation at the March 11 meeting was titled ''About the Union'' (Iwerson), or ''about the decline of unionism'' (Danielson), and that the video title at the March 13 meeting was ''About Collective Bargaining'' (Iwerson), or ''What's the Process of Collective Bargaining?'' (Danielson). All three witnesses agree, finally, that in (at least) one ''video'' meeting, Danielson discussed the possibility that the Respondent might transfer the work of the Omaha communicators to one of the satellite operations in Nebraska, and that in one of the meetings, Danielson made some remark to the effect that ''bargaining starts from scratch'' and that employees could ''lose benefits.''

I also find it useful as a preliminary matter to identify those disputes which I find to be of marginal significance:

Iwerson and Collins recall that Danielson said that the tapes were produced by the ''NLRB.'' Danielson denies this, saying that, in fact, the tapes had been produced by something called the ''Labor Relations Institute,'' and that this is what he reported in the meeting when a question of authorship was raised from the floor. The General Counsel embraces the ''NLRB'' version, but does not claim that this involved any illegality.[18] My assessment of the likelihoods is that Iwerson and Collins were genuinely mistaken in recalling that Danielson had said ''NLRB.''

I dismiss as unreliable Collins' claim that Danielson conducted a first meeting on ''February 20,'' where he made work transfer threats. None of this was corroborated by Iwerson nor by communicator Shepherd. Rather, Iwerson attributes the work transfer remarks to Danielson only in the March 11 meeting, and Danielson agrees that he made such a reference in only one of the ''video'' meetings (although he said that this was in the March 13 meeting).[19] I regard the latter discrepancy as insignificant. It will not affect the lawfulness of Danielson's remarks whether he made them at the first, or the second ''video'' meeting.

b. *The alleged ''closure'' (work transfer) threat*

Iwerson recalls (corroborated by Collins on central points) that on March 11, after the conclusion of the video, one employee asked who had narrated it, and Iwerson himself asked

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[14] 269 NLRB at 1177.

[15] 277 NLRB 1217 (1985), expanding *Rossmore House* teachings even where employees being questioned are not ''open and active union supporters.'' Ibid.

[16] 277 NLRB at 1217; my emphasis. And see following passages (id. at 1217–1218), wherein the majority embraced the principles announced by the Board in *Blue Flash Express*, 109 NLRB 591 (1954).

[17] In addition to Danielson, the Respondent called two telemarketing supervisors (Mark Schmahl and Scott Johnson) and two managers (Michael Dean and Ross Herink). Only Danielson was invited to testify about his remarks at the group meetings. One other employee-witness called by the General Counsel, former communicator Robert Shepherd, was not asked about any such meetings, but he testified that his terminal date of employment with the Respondent was ''March 11,'' making it likely that he attended neither of the acknowledged ''formal'' meetings on March 11 and 13, described below.

[18] The complaint does not allege that the Respondent traded on or otherwise abused the Board's imprimatur or authority.

[19] The General Counsel equivocates about Collins' testimony in this regard. In her factual narration (Br. 2–3), she appears to embrace Collins' claim that a ''February 20'' meeting was conducted by Danielson where he spoke of work transfers. However, in her concluding discussion of the issue, she states (Br. 10):

> The credible evidence establishes that Respondent threatened to close the Omaha communicators' facility and transfer the work to other satellite offices on March 11[.]

whether the union being depicted was the ''Steelworkers.'' Danielson replied to both questions that he did not know. Then, according to Iwerson,

> Mr. Danielson said, ['']. . . see, there you have it, . . . we don't have to deal with the union, . . . as a matter of fact, we could . . . close up this shop here and direct . . . the work you're doing here elsewhere to some of our other satellite offices and let the other satellite offices pick up the slack where you guys would leave off, if you were to vote the union in.['']

Collins, recalling the same meeting, testified that Danielson said,

> . . . the company didn't have to deal with the union, if it came to that. . . . the company could transfer our business out . . . if it came to that.

Danielson, claiming that his remarks on this subject were made on March 13, testified as follows in response to questions from his attorney:

> Q. Do you recall . . . discussing the possibility of work being transferred under certain circumstances?
>
> A. Yes, I do.
>
> Q. And what were those circumstances?
>
> A. The circumstances, if we had a strike and we had to deliver the leads, I still had 50 sales reps and I had to put them, possibly, to other locations; I still had 50 sales people to take care of. . . . And if I had to, I would move my locations at that particular time to still service my sales personnel.

Later, Danielson claimed that he had not even raised the subject of a ''strike,'' but, rather, that someone in the audience had raised some question about a ''strike.'' Both Iwerson and Collins specifically denied that Danielson made these remarks in the context of what would happen in the event of a ''strike.''

c. *The alleged ''futility'' of collective-bargaining statements*

The General Counsel relies on remarks made by Danielson after the March 13 video presentation, as described by Iwerson, to wit:

> After the film, stuff was mentioned about the bargaining. ['']Well, we don't' have to deal with the union,['']again was mentioned by Mr. Danielson. Basically, ['']all negotiations would start at scratch, zero.['']Also, that, you know, again, if we did it, if we did vote the union in, we could lose wages, benefits, and vacations.

Iwerson's account here was obviously summary in character, and it is doubtful that he quoted Danielson with anything near literal accuracy. But Danielson's own testimony on this point was even more impressionistic, generalized, and heavily shaped by leading questions from his counsel; thus:

> Q. Did you discuss the concept of collective-bargaining as far as the process of give-and-take, which had been shown in the videotape?
>
> A. I referred back to the tape as it said that collective bargaining everything starts from scratch and between management and persons in the union they would have to come together and they could build whatever plan was acceptable to both parties.
>
> Q. Did you say that things would be taken away from employees if—
>
> A. I said there's a possibility, as the tape stated, that, yes, things could be removed as far as they have current, yes. That was stated in the film.
>
> Q. Or things could also become better?
>
> A. That's correct.

d. *The Respondent's March 15 letter*

On March 15, the Respondent distributed a campaign letter which stated, inter alia:

> Q. If the union wins the election, would the company close its Omaha operation?
>
> A. Absolutely not. We think we can handle anything that comes along including union representation. However, if during union negotiations it would appear that there would be a possibility of a strike or if there was a strike, there is no question but that the company would have the right to suspend operations in Omaha and transfer telemarketing work to one of the company's other operations. Obviously, how long this would last and whether or not it would be permanent or temporary are questions that cannot be predicted in advance.

e. *Credibility and Conclusions*

Obviously, context and detail can make an important difference to the lawfulness of employer statements concerning work transfers and possible loss of wages and benefits as a consequence of unionization. Yet there is precious little context or detail to be found in the testimony of the three witnesses. Neither did we hear from all the potential witnesses. Thus, the Respondent apparently deemed it not useful to its case to invite four of its managerial witnesses called for other purposes (Schmahl, Johnson, Dean, and Herink) to give their own versions of what Danielson had said at these meetings, which they were elsewhere shown to have attended. An appropriate inference is that these company agents would have failed to corroborate Danielson's versions.[20] Moreover, the videotapes are not in evidence, and the record thus lacks arguably important surrounding contextual information, under circumstances where it is the Respondent who stresses ''context'' in its defense. Thus, a similar adverse inference is warranted from the Respondent's failure to introduce the tapes.[21]

[20] *International Automated Machines*, 285 NLRB 1122, 1123 (1987), overruling *Wayne Construction*, 259 NLRB 571 fn. 1 (1981), ''to the extent it is inconsistent.'' 285 NLRB at 1123 fn. 5. See also *Auto Workers (Gyrodyne Co.) v. NLRB*, 459 F.2d 1329, 1336–1337 (D.C. Cir. 1972).

[21] The record does not affirmatively show that the Respondent possessed or had easy access to copies of those videotapes at the time of this trial, but I would presume that one or the other was true, for the tapes were shown to have been once in its possession, and were never shown to have left its possession thereafter. Similarly, the tapes were once shown to have been available to the Respondent for employer campaign purposes from an organization about which it had apparently unique knowledge, the ''Labor Relations Institute.''

Continued

Considering all this, but with remaining doubts about the completeness of Iwerson's narrations, I credit Iwerson as to all points in conflict.

As to the shutdown/work transfer statements, I find that Danielson made an unqualified threat to transfer Omaha bargaining unit work to a satellite office in order to avoid having to ''deal'' with the Union.[22] This was tantamount to a ''closure'' threat.[23] I thus find that when Danielson made this statement, the Respondent violated Section 8(a)(1).[24]

As to the targeted ''futility'' statements, while Iwerson's account is sketchy, he is firm in declaring that Danielson stated summarily that the Respondent would not have to ''deal'' with the Union, and that if the employees voted in the Union, they could lose wages, or benefits, or vacations, somehow tying this into the assertion that ''bargaining starts from scratch.'' These statements cumulatively implied that the Respondent could deal with a union election victory by taking away employee wages or benefits, and requiring the Union to bargain those takeaways back, ''from scratch.'' Thus, I find that Danielson tried indeed to implant in the communicators' minds a sense of the ''futility'' of collective bargaining, and, by those statements, the Respondent violated Section 8(a)(1).

Moreover, the Respondent's counsel at one point (Tr. 42:14–15) professed to be personally familiar with the contents of the videos. These are all reasonable bases for inferring that the tapes would have been introduced by the Respondent if the Respondent believed that they would corroborate Danielson's claims about the context within which he made the remarks in question. (As we have seen, Danielson's own account of his ''bargaining from scratch'' and related statements stressed that he was simply repeating what had been ''stated in the film.'')

[22] In disagreement with the Respondent's counsel on brief, I do not find that a contrary *credibility* resolution is required simply because 2 days *after* Danielson's final ''video'' meeting, the Respondent distributed the above-quoted campaign letter. In my judgment, this post facto publication does not make it more or less likely that Danielson's version of his remarks in the video meeting(s) was more reliable than Iwerson's and Collins' counterversion.

[23] An employer or its agent may not lawfully predict a plant shutdown as a consequence of unionization unless such predictions are ''carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618–619 (1969). See also, e.g., *Harrison Steel Castings Co*., 293 NLRB 1158, 1159 (1989); *Crown Cork & Seal Co*., 255 NLRB 14 (1981). Iwerson's credited account shows that Danielson attempted no such ''careful phrasing.''

[24] The Respondent does not argue that the March 15 letter quoted above constituted an adequate ''disavowal'' of Danielson's remarks on the subject. I could not so find in any case. The letter contained no acknowledgment that Danielson had previously stated unlawfully that shutdowns and work transfers could be used by the company to avoid having to ''deal'' with the Union. Cf. *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978). Neither did Danielson's ''work transfer'' remarks ''occur in an atmosphere otherwise free of unfair labor practices.'' Cf. *Farm Fresh, Inc*., 305 NLRB 887 (1991). Moreover, whatever ''reassurance'' employees might have experienced from the first quoted passage in the March 15 letter must have been diluted by the surrounding passages in which the Respondent emphasized, in effect, that if it judged that a ''strike'' were even a ''possibility,'' it would ''suspend'' (i.e. ''shut down'') its Omaha office and transfer the unionized communicators' work to satellite operations.

III. IWERSON'S MARCH 26 DISCHARGE

A. *Immediate Facts*

The central participants (Iwerson, his supervisor, Mark Schmahl, and Omaha telemarketing manager, Mike Dean) do not disagree about most of the circumstances: At midmorning on March 26, Iwerson told Schmahl that he could not feed his family on his earnings in his present job, and would therefore be looking for other work. Schmahl thanked Iwerson for the information and said that he would expect some advance ''notice'' (Iwerson recalls ''a few days''; Schmahl recalls he mentioned a ''week's'' notice) from Iwerson before he were actually to quit his job. Schmahl testified that Iwerson also said during these exchanges that he might be a little late for work the next day because he was scheduled to have a job ''interview.'' Iwerson insistently denies that he said this, or that he had any such scheduled interview. I will not resolve this latter conflict; such details, whatever they were, would not affect my ultimate analysis, largely because Dean and Schmahl do not claim that this supposed ''interview'' had any particular impact on their decision to discharge Iwerson, described next.

Later that day, Schmahl and Dean met in Dean's office, where they claim to have decided between them that the Company would be better off firing Iwerson now, rather than waiting for him to leave at his own chosen time. They claim that they reached this judgment after considering that Iwerson's jobseeking and his current ''unhappiness'' would probably distract him from ''focusing'' on selling the Respondent's products, and thus the company probably could not expect much profit from Iwerson's efforts in the future. In making this judgment, they reviewed Iwerson's recent performance statistics, and observed that he had dropped below his previous performance levels in key areas.[25] They each

[25] That Iwerson's ''performance'' had in some sense recently declined does not appear to be in question. Indeed, Iwerson qualifiedly conceded that ''maybe, to some extent,'' his ''production so far as sales achieved and demos was, in fact, down in March from a previous high or a previous average.'' Company production statistics (R. Exhs. 2, 3, and 5) paint a confusing picture, but suggest that Iwerson had recently dropped below previous performance levels in terms of ''production rate,'' and ''sales,'' (see R. Exh. 5), and that he was the ''lowest'' among his fellow siding communicators in terms of ''Issue'' percentage, in the week ending March 14. (See R. Exh. 3). Not directly disputing this, the General Counsel made a limited effort to show that at least one other communicator in a different department, P.D. Pistulka, had a performance record worse than Iwerson's, but was not discharged. I will not get into further details. The record is too vague to be able to identify what the Respondent considered to be an ''acceptable'' or ''unacceptable'' level of performance by a communicator. And if the Respondent's defense depended solely on its persuading me that Iwerson's performance had dropped to intolerably low levels, I would resolve doubts against the Respondent, who bore the burden of making a clearer presentation on these points than it did. But, as I note above and below, the Respondent does not attempt such a claim, but merely cites a recent—and perhaps otherwise tolerable—decline in Iwerson's performance as an additional consideration auguring against keeping him on the job in the light of his announced decision to look elsewhere for work. And, on the record made here, Dean's and Schmahl's claimed belief that Iwerson had recently dropped off in terms of profit-yielding sales leads does not appear to be merely a post facto invention on their part, but a reasonable and credible belief based on essentially undisputed facts.

explain further, however, that these were genuinely cumulative reasons, and that they would not necessarily have reached the same decision if Iwerson's production statistics had been the same, but he had not indicated any intention of quitting his job. Indeed, their testimony suggests overall that their primary concern was that Iwerson's ''unhappiness''—and his likely near-term departure for greener pastures—would be incompatible with the Respondent's business need for communicators who were ''positively'' motivated enough to convey enthusiasm for the Respondent's products during their critical telephone contacts with potential customers.

Whether these reasons were, in fact, the ones—and the only ones—which figured in the discharge decision are important ultimate questions, to which I shall return in my concluding analyses. For now, I note that Iwerson and Schmahl substantially agree that Schmahl echoed these reasons when he informed Iwerson still later, between 5 and 6 p.m., that he was being discharged. And Iwerson and Dean substantially agree that Dean repeated these same reasons when Iwerson left Schmahl's office to protest to Dean that he should not be discharged.

But there are potentially significant conflicts about other features of the Iwerson-Dean meeting. Thus, while Iwerson and Dean agree that Iwerson asked Dean if his ''union activities'' had anything to do with his discharge, they disagree about how Dean replied to this question. Dean testified that he simply replied that ''it [union activities] didn't have anything to do with it at all.'' But Iwerson testified—and Dean specifically denied—that, in replying to Iwerson's union activities query, Dean stated:

> [H]e [Dean] could care less what happened or how it happened, but the corporate office, across the street, did know I carried a big torch. And I did not say anything in return. I didn't ask him what he meant by it, and I left.

I note that Iwerson purported to describe the entire conversation with Dean in this initial account. But in his answers to a followup series of leading questions by counsel for the General Counsel, Iwerson amended and elaborated this testimony somewhat, most notably in the following exchange:

> Q. And did Mr. Dean tell you who was making the decision?
>
> A. He didn't mention any names. He just had mentioned that the people across the street . . . knew that you did carry a big torch *and it was coming down from higher than him is what he told me*.

I found Iwerson flatly unconvincing in his second and more elaborate recapitulation, particularly in the underscored emendations of his original account, where he suggested for the first time that Dean sought to distance himself from responsibility for the decision. I think Iwerson was gilding the lily. There is no independent evidence that Dean was only the conduit for a decision made higher-up; indeed, the only ''higher-up'' on this record was Danielson, himself, and Danielson credibly testified that he was not consulted before Dean and Schmahl decided to fire Iwerson, and that, in fact, he was ''on vacation'' during this period. Thus, I find in summary that Schmahl and Dean told Iwerson in firing him that his decision to look elsewhere for work, coupled with a recent decline in his production, had caused Schmahl and Dean to agree that he should be terminated now. And while I find that Dean acknowledged to Iwerson that his union activities were well-known to the ''people across the street,'' I find that Dean specifically denied to Iwerson that those union activities played any role in the decision to fire him. Finally, I find that, in fact, only Dean and Schmahl were involved in the decision to fire Iwerson.

B. *Analysis, Supplemental Findings, and Conclusions*

The General Counsel's central claim is that the Respondent would have allowed Iwerson to remain in its employ until he located other work, absent its hostility to his union activities. Under *Wright Line*,[26] for the General Counsel to prevail on this claim, he must first make,

> . . . a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision.[27]

But,

> Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[28]

I find that the General Counsel established a prima facie case of unlawful motivation: Thus, I have found that the Respondent's key actors were aware of Iwerson's union activities before the decision to fire him was reached, and, indeed, that Herink impliedly threatened Iwerson that he would be out of a job because of those activities. And Iwerson was discharged, without prior warning, soon after the Union lost the election. Finally, with ''knowledge'' and ''timing'' thus clearly established, I recall that the Respondent's agents committed numerous independent violations of Section 8(a)(1), including by discriminatory attempts to interfere with Iwerson's presumptive right to engage in prounion discussions with his fellow employees, and thus exhibited ample antiunion ''animus.'' With these typical prima facie elements firmly in place, I have no difficulty concluding under *Wright Line* that it became the Respondent's burden to ''demonstrate'' that Iwerson's announced decision to look elsewhere for work, considering as well his recent decline in productivity, would have caused the Respondent to discharge him even if he had never been involved in the union drive.

This is a close case, but I find that the testimony of Schmahl and Dean, largely corroborated by Iwerson himself, was enough to sustain the Respondent's burden. The key points are that I believe Schmahl and Dean in their harmo-

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[26] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); see also *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), affd. *Wright Line* tests.

[27] 251 NLRB at 1089.

[28] Ibid. And see fn. 14, appended to the above-quoted text:

> in those instances where . . . the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. Whether that ''cause'' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

nious claims that it was Iwerson's announced decision to locate another job, coupled to his recent performance decline, which genuinely and alone formed the basis for their decision to fire him.[29]

I am influenced by my sense of the ''realities of the workplace,'' articularly *this* workplace. In a different setting, such as in a manufacturing operation, it might be seen as unusual for an employer to fire an employee from his or her routine job on the widget line simply because that employee had indicated a wish to look elsewhere for work. One might reason that the employer in that case might still expect to realize a profit from the employee's time spent on the line. But we are dealing with a telephone sales boilerroom operation, where Iwerson's value to the employer lay solely in his ability consistently to generate enough customer leads that turn into actual sales to make his employment profitable to the Respondent. And merely putting in time on the phone is not enough in that setting. The communicator must do more than deliver a scripted pitch; he must do so with enthusiasm, in a sales business where the typical motivator for such enthusiasm is an expectation on the communicator's part that he will earn decent money in commissions if he ''sells'' well enough, but will not find it acceptable merely to draw straight base pay. Indeed, one of the more widely known aspects of the door-to-door or telephone sales business is that such salespersons are expected to be ''motivated'' enough to generate as much or more in profits for their employer than they are paid in guaranteed flat pay rates. And a corollary to this generalization is that employers of such salespersons are quick to fire sales personnel who do not consistently carry their own weight in the operation, and particularly so when they no longer show any real enthusiasm for the job, such as by complaining that they aren't earning enough, and intend to seek work elsewhere. Indeed, most salespeople know better than to give voice to such thoughts, because of the likely employer reaction.

Thus, in this setting, it strikes me as entirely plausible that when Schmahl and Dean took the time to reflect on Iwerson's declared dissatisfaction with his job and his intention to locate another one, they would quickly conclude that his likely future value to the Respondent would be marginal. And I deem it equally plausible that Iwerson's recent decline in sales performance, however forgivable in a different context, would have been seen by Schmahl and Dean as simply an additional indicator that Iwerson would not likely generate any future profits for the company, but would simply put in his time and draw a flat hourly rate while saving his enthusiasm and energy for his seeking of work elsewhere. There is no obvious evidence of ''disparate treatment,'' indeed, it appears that Iwerson's precise situation was unprecedented.[30] I have considered other facts urged by the General Counsel, and find them to be largely irrelevant to these central points. I treat this as a case where the prima facie appearance that Iwerson's union activities motivated the Respondent's decision to fire him have been overridden by a critical intervening event, Iwerson's announcement of his decision to seek other work, thus plausibly triggering a sufficient innocent reason on the Respondent's part to terminate him.

I therefore conclude as a matter of law that the Respondent did not violate Section 8(a)(3) or (1) when it fired Iwerson.

THE REMEDY

Concerning the representation case, I find that the Respondent's unfair labor practices as found above in section II,B,1–4, all shown to have occurred within the critical period between the filing of the petition on February 19 and the election on March 20, was, a fortiori objectionable conduct tending to interfere with a free and fair election. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Thus, my recommended Order includes provisions for setting aside the election and conducting another one after the Respondent remedies its unfair labor practices.

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to post a remedial notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondent, Pacesetter Corporation, Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union activities or sympathies, or seeking to prevent them from talking about the Union among themselves, or threatening employees with adverse consequences for selecting a union, or otherwise seeking to impress upon employees the futility of collective bargaining.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[29] I take this opportunity to comment on points made, respectively, by the General Counsel and the Respondent on brief. I agree with the General Counsel that Schmahl's and Dean's versions of the specific circumstances under which they met and reached a decision to discharge Iwerson are in some respects inconsistent. But I regard these inconsistencies (precise timing of their meeting; how it was that Schmahl found himself in Dean's office) as collateral, and not enough to warrant discrediting those central features of their accounts which are entirely harmonious. Separately, I ascribe relatively little weight to Danielson's claims that, shortly after the election, he issued instructions to all his supervisors and managers that there was to be,

> . . . no retaliation against Mr. Iwerson. He would be judged on his perform[ance] and his performance only.

This testimony was again uncorroborated, and even if true, does not in my view make it significantly less likely that Schmahl or Dean would have been influenced by Iwerson's union activities when they decided to fire him.

[30] The Respondent attempted to show through Schmahl's testimony and a companion exhibit (R. Exh. 4) that the Respondent had likewise terminated an employee named Frischenmeyer in November 1990, after Frischenmeyer had given a week's notice of his intent to quit. In fact, the exhibit does not corroborate Schmahl's testimony; it shows only that Frischenmeyer had ''left voluntarily to go back to Kansas.'' The implication is that he had simply ''quit,'' but had not been discharged.

[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Post at its telemarketing offices and phone room in Omaha, Nebraska, copies of the attached notice marked ''Appendix.''[32] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election conducted in Case 17–RC–10640 is to be set aside, and a new election conducted at such point as the Regional Director determines that the Respondent has remedied its unfair labor practices by complying with the remaining provisions of this Order.

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''